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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 116

SAM HANNA FOGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 248-254) have not yet been reported. The oral opinion of the district court appears at R. 235-237.

JURISDICTION

The judgment of the circuit court of appeals was entered May 7, 1948 (R. 255), and a petition for rehearing was denied May 28, 1948 (R. 264). The petition for a writ of certiorari was filed June 24, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as

amended by the Act of February 13, 1925. See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioner's motion for a new trial on the basis of alleged newly discovered evidence as to his age in a prosecution for failure to register for selective service.

STATUTES AND REGULATIONS INVOLVED

The Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, as amended by the Act of December 20, 1941, c. 602, § 1, 55 Stat. 844, provided in pertinent part:

> SEC. 2 [50 U.S.C. App. 302]. Except as otherwise provided in this Act, it shall be the duty of every male citizen of the United States, and of every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and sixty-five, to present himself for and submit to registration at such time or times and place or places, and in such manner and in such age group or groups, as shall be determined by rules and regulations prescribed hereunder.
>
> * * * * *
>
> SEC. 10 [50 U.S.C. App. 310]. (a) The President is authorized—
>
> (1) to prescribe the necessary rules and regulations to carry out the provisions of this Act;
>
> * * * * *

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> Sec. 11 [50 U.S.C. App. 311]. * * * any person * * * who * * * evades registration * * * or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, * * * shall, upon conviction * * *, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *.

Presidential Proclamation No. 2535, issued January 5, 1942, and designating Third Registration Day (7 F.R. 177), provided in pertinent part:

> 2. (a) Every male citizen of the United States, and every other male person residing in the continental United States * * * is required to and shall on February 16, 1942, present himself for and submit to registration before a duly designated registration official or selective service local board * * * if such male citizen or other male person on December 31, 1941, has attained the twentieth anniversary of the day of his birth and on February 16, 1942, has not attained the forty-fifth anniversary of the day of his birth, and has not heretofore been registered * * *.

Presidential Proclamation No. 2541, issued March 19, 1942, and designating Fourth Regis-

tration Day (7 F. R. 2181), provided in pertinent part:

> 2. (a) Every male citizen of the United States, and every other male person residing in the continental United States * * * is required to and shall on April 27, 1942, present himself for and submit to registration before a duly designated registration official or selective service local board * * * if such male citizen or other male person on February 16, 1942, had attained the forty-fifth anniversary of the day of his birth and on April 27, 1942, has not attained the sixty-fifth anniversary of the day of his birth, and has not heretofore been registered * * *.

STATEMENT

A single-count indictment (R. 1-2) filed January 22, 1947, in the District Court for the Northern District of Texas charged that petitioner, on or about February 16, 1942, with intent to evade military service, wilfully failed to register with a selective service draft board, in violation of the Selective Training and Service Act of 1940, as amended, and the regulations and orders thereunder. Following a trial by a judge, a jury having been waived, petitioner was found guilty and sentenced to 18 months' imprisonment and to pay a fine of $1,000 (R. 244-245). On appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment of conviction was affirmed, Circuit Judge Sibley dissenting. *Fogel* v. *United States*, 162 F.

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2d 54. On October 20, 1947, this Court denied certiorari. 332 U. S. 791.

Thereafter, on November 3, 1947, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, petitioner filed in the district court a motion for a new trial on the ground of newly discovered evidence (R. 2-5), which gave rise to the instant proceeding. Following a hearing before the same district judge who had originally found petitioner guilty (R. 13-234), the motion was denied (R. 8-9, 235-237). On appeal, the order of denial was affirmed, Circuit Judge Sibley again dissenting (R. 255).

The relevant facts may be summarized as follows:

At the original trial, the Government established by the testimony of a selective service official that petitioner, an alien resident of the United States (R. 72-74),[1] never registered for selective service in World War II (R. 83-84; see also R. 74, 80), and that fact was not and is not disputed. Petitioner's trial counsel, in cross-examining this official, asked if he had made any investigation as to whether petitioner had registered in World War I, and the official said he had made no investigation as to that (R. 84).

Another government witness at the original trial, Glenn Torrence, a naturalization examiner of the Immigration and Naturalization Service, testi-

[1] The transcript of the trial testimony was introduced in evidence at the hearing on the motion for a new trial (R. 69), and appears in the present record at R. 70-110.

fied that on two different occasions, February 7, 1946, and September 12, 1946, petitioner stated under oath to him, in a proceeding to establish his lawful entry into the United States as a preliminary to filing a declaration of intention to become a citizen, that he was born on July 10, 1898 (R. 72-73, 76). If that was petitioner's birth date, he was 43 years old on February 16, 1942, and was required by the terms of Proclamation No. 2535 (*supra,* p. 3) to register for selective service on that date.

On cross-examination of Torrence, the following occurred (R. 76-78):

> Q. Have you made any effort to verify whether Mr. Fogel's entry into this country was lawful?
>
> A. Yes, sir.
>
> Q. Have you found out anything about that?
>
> A. I found there is no record extant of his entry into the United States.
>
> Q. Is it your testimony there is no such record?
>
> A. That is the information furnished us by his claimed port of entry, I think it is Philadelphia, they have no record there of his entry into the United States.
>
> Q. Mr. Torrence, did you check the Hamburg Lines in Philadelphia, when he was supposed to have entered here?
>
> A. I did not, no, sir.

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Q. Did anybody from your department?
A. I believed that was checked.

* * * * *

Q. Do you have the ship on which Mr. Fogel came to this country?

A. Mr. Fogel says he doesn't remember the ship, I believe, he came, on which he says he came, only the Hamburg Line, and this application to file a declaration of intention was returned by our Philadelphia office, under date of August 22, 1945, stamped "Unable to verify," and the notation, "No definite statement of date of arrival. Note World War I, in 1914-1918, no German Passenger Ship arrivals then at Philadelphia."

Q. Mr. Torrence, does the log of a ship, or the records of a ship, on an immigrant, call for his age, listing of his age?

A. I believe it does. I am not able to state definitely at this time, I don't recall what all information is called for in the manifest.

* * * * *

Q. If I gave you the name of the ship, Mr. Torrence, that Mr. Fogel came into this country on, would you be in a position to get the log and show his age when he entered this country?

A. I don't know that we can get the manifest, we can get an extract of the information appearing in that manifest, which would be an official record furnished by the Port of Entry.

Q. You could do that back in June of 1913,

if that is the time that he came into this country?

A. Yes, sir.

Q. For your information, I would like to state that the evidence will develop that the ship he came in here on is the Maarian, of the Hamburg Line, and he arrived in the United States on June 18, 1913.

A. That is possible.

Q. I say, the evidence will develop and you can get the records of his age, at that time?

A. If there is a ship manifest showing his entry at that time, we can get it, yes, sir.

Mr. Corenbleth [petitioner's attorney]:

That is all.

The matter was not further pursued, and there was no request for a continuance of any kind for the purpose of making a fuller check as to the existence of documentary evidence of petitioner's arrival in the United States.

A third government witness at the original trial, Alton Bryant, a special agent of the Federal Bureau of Investigation, testified that at the request of the Immigration and Naturalization Service he had a "talk with Mr. Fogel, in regard to his registration for Selective Service, inasmuch as he had not produced a card for them," and that petitioner was unable to produce a registration card (R. 79-80).

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On cross-examination of Bryant, the following occurred (R. 81):

> Q. He told you, didn't he, that he did not know how old he was?
>
> A. That is right.
>
> Q. What was it, exactly, he said about his age?
>
> A. I asked him about his age, and he told me he did not know exactly when he was born, he was born in Poland, some city, I don't recall the name, in Poland, that he was born there, he did not recall the exact date when he was born, and we further tried to arrive at that time by the time at which he came to this country, about how old he was at that time, and about how long he had been here, and was unable to ascertain any satisfactory answers as to approximately when he came, as to how he came, where he came to, when he came to the United States, what port he entered or any information about him, sir, at all.

Petitioner's defense at his trial was that he was over 45 years of age on February 16, 1942, so that he did not fall within the age group required to register by Proclamation No. 2535 (R. 97-105).[2] Pe-

---

[2] Petitioner also invoked the statute of limitations as a bar to the prosecution, but the trial court ruled that the offense was of a continuing nature and hence not barred (R. 89-97), and the ruling was upheld on appeal. *Fogel* v. *United States*, 162 F. 2d 54, 55 (C. C. A. 5), certiorari denied, 332 U. S. 791. This aspect of the original case is, consequently, not involved in the present proceeding.

titioner's evidence in respect of his age consisted of the testimony of his brother Joseph, who testified that he, Joseph, came to the United States from Poland in 1912 at the age of 21 (R. 99) and that shortly thereafter he sent for petitioner, who arrived in the United States on June 18, 1913, at which time petitioner was "close to twenty" (R. 100). According to Joseph's testimony, therefore, petitioner was 48 years old on February 16, 1942, and thus not within the age group specified in Proclamation No. 2535. Joseph further testified that petitioner arrived in Philadelphia on the ship "Maaian" of the "Hamburg Line," and that he went by the name of "Shlema" Fogel at that time (R. 103-104). Joseph admitted that "in the old Country, they actually kept no exact date of birthdays." He explained how he knew that he himself was 21 when he emigrated to the United States by saying that he left Poland to avoid being called into the Russian Army, departing four weeks before his induction was due, and that this was the only way he could recall his age at the time of his emigration. (R. 105.) He explained how he knew petitioner's approximate age by saying that there was "about two and a half years difference" between their ages according to "what my mother used to tell" (R. 103).

Petitioner himself did not testify at his trial.

Petitioner's motion for a new trial alleged that—

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> At the time of his trial he was named as "Samuel Hannah Fogel"; that the agents of the Bureau of Immigration and Naturalization testified that they had been unable to find the entry of this defendant into the United States, who was a Polish immigrant and who was alleged to have entered the United States some time in the year 1913; that they were unable to establish the age of the defendant at the time he entered because they could find no records in the Bureau of Immigration and Naturalization at the port of entry. That since said trial it has been discovered that this defendant had entered under the name of Schloime Vogel, and therefore the Bureau of Immigration and Naturalization had no way of finding the record of the defendant's entry; * * * (R. 3).

It further alleged that the official record of "Schloime Vogel's" entry into the United States would show that he "was 20 years of age on June 30, 1913, and therefore was not required to register under the act and proclamation for which he was charged with having violated" (R. 4). It finally alleged that—

> * * * since said trial the defendant has further learned that he registered under the Selective Service Act of World War I in Waxahachie, Texas, and that his said registration will show that he was far beyond the age of 45 at the time he was indicted for having so failed to register, * * * (R. 4).

Attached to the motion were two affidavits stating that "Schloime Vogel" and petitioner are one and the same person (R. 6-8).

At the hearing on the motion, petitioner introduced in evidence the official record of the entry into the United States of "Schloime Vogel" (R. 31). This record indicates that this person emigrated from Roszyny, Russia, arriving in Philadelphia on the ship "Merion" on June 30, 1913. "Josef Vogel, 1613 S. Orkney St., Phila., Pa." was given as the name and address of the immigrant's brother. The immigrant's height was given as 5 feet, 5 inches, his complexion as fair, the color of hair as light brown, and the color of his eyes as gray.[3] His age was given as 20.[4]

Petitioner's brother Joseph testified at the hearing that he was the "Josef Vogel, 1613 S. Orkney St., Phila., Pa." referred to in the entry record, and that "Schloime Vogel" is merely the Hebrew equivalent of Samuel Fogel (R. 63-65). One Selcovits, a friend of the two brothers, who was living with Joseph at the Philadelphia address at the time petitioner allegedly arrived in this country, gave similar testimony (R. 45-48).

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[3] The record indicates that petitioner's height is 5 feet, 8 inches, his complexion is ruddy, his hair is black, turning gray, and his eyes are brown (R. 33, 23). In addition, several witnesses at the hearing testified that they knew petitioner in Texas around the years 1916-1917, and that his hair and eyes were dark at that time (R. 17, 21, 23, 27).

[4] Which, if true, and if petitioner and Schloime Vogel are the same person, would have made petitioner 48 or 49 on February 16, 1942, and so not within the age group covered by Proclamation No. 2535.

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Petitioner also introduced in evidence at the hearing on the motion his World War I draft registration record, dated June 5, 1917 (R. 233). This indicated that at that time he gave the year of his birth as 1894, and his age as 23.[5]

Petitioner, as at the original trial, did not testify at the hearing.

The Government established at the hearing that petitioner, on fifteen occasions between March 9, 1927, and March 12, 1935, in applying for life insurance policies, gave the date of his birth as July 10, 1898 (R. 122, 133, 146, 152, 156, 160, 164, 168, 171, 175, 179, 183, 186, 190, 207). The Government also showed that on October 30, 1946, petitioner gave July 10, 1898, as the date of his birth to a deputy United States marshal on the occasion of his arrest in this case (R. 216-217). This was the same date which, according to the Government's evidence at the original trial, petitioner gave as his birth date to the immigration officials in the proceeding to establish his lawful entry into the country (*supra* p. 6), and would have made him 43 years old on February 16, 1942, the date on which persons up to 45 years of age were required to register for selective service.

In support of the contention that the new evidence offered at the hearing on the motion for a new trial was newly discovered evidence, peti-

[5] Which, if true, would have made petitioner 47 or 48 on February 16, 1942, and so not required to register under Proclamation No. 2535.

tioner's counsel stated to the court—and the court agreed to give the statement "some consideration"—that petitioner's trial attorney would testify, if present, that he "knew nothing on earth about Sam Fogel having registered for World War I, at the time he tried this case; he would further testify * * * that he did not know that Sam Fogel entered the United States under the name of Schloime * * * Vogel" (R. 234). Counsel pointed to the difference between petitioner's Hebrew name and its anglicized version as justification for the trial attorney's failure to locate and produce the record of petitioner's entry into the country, and added that "one of the immigration men testified they had been unable to find any place where he had entered. That is perfectly natural, because they were looking for Sam Fogel * * * and they did not know, of course, that his Polish name, or Jewish name was Schloime Vogel" (*ibid.*).

In his oral opinion denying the motion for a new trial, the district judge, after reviewing the conflicting evidence adduced at the hearing as to petitioner's age (R. 235-237), stated that the motion was denied on the ground that the evidence was not newly discovered evidence (R. 237). He added, however (*ibid.*):

> * * * But, if we were to concede that it was newly discovered evidence, and that his birth date was back in 1894, instead of 1898, under the law, as pointed out by the District

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Attorney, it would still have been his duty to have registered, and we believe that he could be put on trial again, if we granted a new trial, under the indictment, as it now exists.

And, that being the case, we see no reason for setting aside the judgment, and granting a new trial.

ARGUMENT

Petitioner, conceding that the granting or denial of a motion for a new trial on the ground of newly discovered evidence rests within the sound discretion of the court, contends that in this case that discretion was abused (Pet. 19-20). The contention is founded in large part on the belief that the district judge was convinced and found as a fact that petitioner was more than 45 years of age on February 16, 1942, and so not within the age group required to register for selective service on that day, but nevertheless arbitrarily refused to vacate the conviction and grant a new trial (Pet. 20, 27). This belief, in turn, stems from the district judge's statement in his oral opinion that "when this man came over here, he was a bright young fellow, twenty years of age" (R. 237; see Pet. 27). When this statement is read in its context, however, it is manifest that the judge was there speaking in a loose sense and did not intend the oral, casual remark as a specific finding of fact. For earlier in the opinion, he said (R. 235), "The defendant, Sam Fogel, seems considerably confused about how old he is. He was born in Russia,

or Poland, sometime, it appears, in the Nineties." Such a remark is scarcely consistent with a precise finding as to petitioner's age in 1913, when he emigrated to this country. Again, at the end of the same paragraph in which occurs the language relied on by petitioner (R. 237), he said, "But, if we were to concede * * * that his birth date was back in 1894, instead of 1898, under the law, * * * it would still have been his duty to have registered * * *." It is clear from this that the judge made no definite finding, and expressed no conviction, as to petitioner's exact age at the time of his emigration.

The fact is that, without attempting to resolve the evidential conflict as to petitioner's age, the district judge denied the motion for a new trial because he did "not believe that the evidence, so far as the defendant is concerned, is newly discovered evidence" (R. 237). Contrary to petitioner's contention (Pet. 20-25), we submit that in so ruling he clearly did not abuse the discretion which admittedly was his to exercise.

To warrant the granting of a new trial on the basis of newly discovered evidence, it is well settled that the new evidence relied on must be in fact newly discovered and such that the movant could not reasonably be expected, with the exercise of due diligence, to have known about it at the time of the trial. *Weiss* v. *United States,* 122 F. 2d 675, 691 (C. C. A. 5), certiorari denied, 314 U. S. 687; *Evans*

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v. *United States,* 122 F. 2d 461, 468-469 (C. C. A. 10), certiorari denied, 314 U. S. 698; *Wagner* v. *United States,* 118 F. 2d 801, 802 (C. C. A. 9), certiorari denied, 314 U. S. 622; *Prisament* v. *United States,* 96 F. 2d 865, 866 (C. C. A. 5); *Johnson* v. *United States,* 32 F. 2d 127, 130 (C. C. A. 8). The two new items of evidence relied on in the motion for a new trial were (1) petitioner's World War I draft registration record, showing that he gave his age as 23 in June 1917 (*supra,* p. 13), and (2) the immigration record of his entry into the United States,[6] which listed his age as 20 in June 1913 (*supra,* p. 12). We submit that, with due diligence, petitioner could have produced both these instruments at his trial, and that consequently the district judge was warranted in refusing to consider them as newly discovered evidence within the rule permitting the granting of a new trial on that basis.

With regard to the World War I draft registration record, petitioner obviously knew at the time of his trial, and long before, whether or not he had ever registered for selective service in the First World War. Registering for the draft is undeniably a major event in any man's life, and is not likely to be forgotten. Consequently it was idle for

[6] We assume, *arguendo,* that petitioner is the same person as the "Schloime Vogel" who was the subject of this entry record. The majority below, however, were "in no wise" convinced of this (R. 251), because of the wide disparity between petitioner's physical characteristics and those of the subject of the entry record as listed therein (R. 250; and see p. 12, *supra*).

him to allege, as he did in his motion for a new trial (*supra,* p. 11), that "since said trial" he had "learned that he registered under the Selective Service Act of World War I." Obviously, too, he could have procured his draft registration record for use at his trial just as easily as he procured it for use in connection with the motion for a new trial.[7]

With regard to the immigration record of petitioner's entry into the United States, due diligence on petitioner's part would likewise have enabled him to procure this document at the time of his trial. All the pertinent facts that were needed to locate this document, and particularly the key fact that he entered the country under the name of Schloime Vogel, rather than Samuel Fogel, were peculiarly within his knowledge. Petitioner certainly knew what port he landed at, the approximate date of his arrival, and the name of the ship

---

[7] Petitioner's assumption that because his trial *attorney* was unaware of the existence of his World War I draft registration record, the record may be considered as newly discovered evidence (Pet. 24-25), is unfounded. Evidence, to be newly discovered, must have been unknown and unavailable to the defendant himself at the time of his trial. Moreover, it seems scarcely conceivable that petitioner's trial attorney, whose principal contention at the trial was that petitioner was well over 45 years of age on February 16, 1942 (and consequently of draft age during World War I), would not have thought to ask petitioner whether he registered for the draft in the First World War. Significantly, in this connection, the trial attorney, in cross-examining the selective service official who testified that his investigation had disclosed that petitioner did not register for selective service, was careful to adduce the admission that the witness' investigation had been limited to the World War II draft and had not been concerned with the World War I draft (*supra,* p. 5).

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on which he arrived. Indeed, both his trial attorney and his brother Joseph, who testified at the trial, seem to have been entirely familiar with all such data (see pp. 10, [redacted], *supra*). The immigration authorities, however, after a careful check of their files, had found "no record extant of [petitioner's] entry into the United States" (*supra*, p. 6). Yet petitioner made no motion for a continuance for the purpose of making a further investigation as to whether the record was available. The key to the mystery of the apparent non-existence of the entry record—the fact that petitioner came into the country under a different name from that which he subsequently adopted—was within the power of petitioner to produce. Petitioner's brother Joseph was well aware at the trial that when petitioner arrived in this country he had a different first name, at least, from his subsequently adopted one (*supra*, p. 10), and it is unreasonable to suppose, therefore, that petitioner himself had forgotten the fact. In any event, reasonable diligence on the part of petitioner and his trial counsel would certainly have resulted in the production of the entry record at the trial.[8]

---

[8] The dissenting judge below said (R. 254), "As to the record evidence [of petitioner's entry] being newly discovered, of course Josef and Sam knew that Sam came to Philadelphia in 1913, and there ought to be a record of his entry. The Bureau of Immigration and Naturalization was asked for it and reported that none could be found. It has since been found. How can the Government, which had the record all the while and said it did not exist, assert a want of diligence in producing it?" This argument is now adopted by petitioner (Pet. 11, 17-18, 20, 21, 24). The argument, however, ignores entirely the crucial fact that the reason why the immigration authorities could not

Furthermore, apart from the question of whether the district judge was justified in finding that the proffered new evidence was not newly discovered, he was clearly correct, we submit, in the alternative ground of denial of the motion for a new trial (supra, pp. 14-15). For, as was pointed out at pp. 13-14 of our brief in opposition to certiorari in *Fogel* v. *United States,* No. 285, last Term, certiorari denied, 332 U. S. 791, even if petitioner was over 45 on February 16, 1942, he would have been required, having been under 65, to register on April 27, 1942, under the terms of Presidential Proclamation No. 2541 (*supra,* pp. 3-4). He did not register on that date either, as proved by the government at the original trial. It would seem that such proof was sufficient to establish petitioner's guilt under the indictment inasmuch as the offense was alleged to have been committed "on or about the 16th day of February, A. D. 1942" (R. 1) and the indictment did not make reference to any particular Presidential Proclamation fixing a specified date of registration (R. 1-2).[9]

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find the record was the fact that there was none under the name of *Samuel Fogel,* and that due diligence on petitioner's part in disclosing the disparity in the name by which he entered the country and that which he subsequently adopted would have resulted in the discovery of the record. Indeed, this was conceded in the motion for a new trial (*supra,* p. 11), and in the course of the hearing below (*supra,* p. 14).

[9] *Cole* v. *Arkansas,* 333 U. S. 196, relied upon by the dissenting judge below (R. 253) and by petitioner (Pet. 33-34) as invalidating the alternative ground on which the district judge denied the motion for a new trial, is distinguishable from the present case. There, the defendants were tried for and convicted of the crime of promoting an unlawful as-

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CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

PHILIP B. PERLMAN,
Solicitor General.
T. VINCENT QUINN,
Assistant Attorney General.
ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

JULY 1948.

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semblage. Their conviction was affirmed on the ground that they had been proved guilty of the crime of using force and violence to prevent a person from following a lawful vocation. As pointed out by the Court (333 U. S. at p. 200), the two offenses were "separate, distinct, and substantially different." In the present case, it scarcely can be said that the offense of failing to register for selective service on February 16, 1942, was "separate, distinct, and substantially different" from the offense of failing to register for selective service on April 27, 1942. The essence of the offense in either case was failing to register as required by law. Petitioner concededly did not register as required by law, since he admits to being under 65 and hence in a class that was required to register at some time. And, as we have pointed out in the text, failure to register as required by law was all that he was charged with, since the indictment alleged that the offense occurred "on or about" February 16, 1942, and no specific Presidential Proclamation was alleged to have been violated.

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